United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1378

To be argued by
SHIRAH NEIMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1378

UNITED STATES OF AMERICA,
Appellee,

—*against*—

VINCENT GUGLIARO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Vincent Gugliaro appeals from a judgment of conviction entered March 1, 1974, in the United States District Court for the Southern District of New York after a five day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury, and from an order of Judge Wyatt on February 28, 1974 denying his motion for a new trial.

Indictment 73 Cr. 513, filed May 3, 1973, charged Gugliaro in seven counts with perjury in violation of Title 18, United States Code, Section 1623.

Trial began on January 14, 1974, and concluded on January 18, when Gugliaro was convicted on Count Four and acquitted on the remaining counts. On March 1, 1974, Judge Wyatt sentenced Gugliaro to two years imprisonment, 3 months to be served in jail, to be followed by two years probation, and a $3,000 fine.

Gugliaro is free on bail pending this appeal.

Statement of Facts

A. Introduction.

Indictment 70 Cr. 967, filed November 19, 1970, charged Vincent Gugliaro and fifteen others with conspiracy to violate the federal securities laws and to commit mail fraud, and with substantive violations of the federal securities laws and mail fraud in violation of Title 18, United States Code, Sections 371 and 1341 and Title 15, United States Code, Section 78j(b). Ten of the defendants, including Gugliaro, were tried before the Honorable Morris E. Lasker, United States District Judge, and a jury in October, November and December of 1971 (this trial is hereinafter referred to as "Imperial I"). That jury convicted two of the defendants, Ronald Alpert and Bernard Weiss, but either acquitted or disagreed as to all other defendants. The jury acquitted Gugliaro on the substantive counts and disagreed on the conspiracy count.*

Gugliaro's retrial on the conspiracy count was consolidated with the trial of certain defendants severed from the first trial and two defendants as to whom the jury had rendered a similar verdict at Imperial I,** and was held before the Honorable Lawrence Pierce, United States District Judge, and a jury in May, June and July of 1972 (this trial is hereinafter referred to as "Imperial II"). The jury found all the defendants, including Gugliaro, not guilty.

At both trials, Gerald Devins testified as a Government witness that he had artificially manipulated the price of the

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* The substantive counts had been submitted to the jury as to Gugliaro with a Pinkerton charge.

The jury reported their disagreement as eleven to convict and one to acquit Gugliaro on the conspiracy charge (Imperial I Trial Transcript at 7206).

** John Dioguardi, Robert Frank, Philip Bonodono, Erwin Layne and Gugliaro were tried before Judge Pierce.

common stock of Imperial Investment Corporation (hereinafter "Imperial") with Sidney Stein and Robert Frank. The Government's theory was that Devins eventually turned to Michael Hellerman to aid him in this fraud; that Hellerman (through coercion and extortion) took control of the fraudulent scheme and expanded it; that Hellerman brought into the conspiracy his boss, John Dioguardi (who brought in *his* boss, Carmine Tramunti), and also brought in various brokers and stock manipulators, including Murray Taylor; that Taylor in turn brought in Ronald Alpert and Bernard Weiss and that Alpert, in turn, brought in a "Brooklyn Group", including Philip Bonodono and Erwin Layne; and that they, in their turn, brought in Vincent Gugliaro (and *his* boss, Vincent Aloi) as head of the "Brooklyn Group."

The evidence at the first trial traced the scheme from its inception in Florida in late January 1969 through several phases until October, 1969, when the people who had been manipulating the stock approached Alpert for his assistance. The evidence of Gugliaro's participation came from Murray Taylor, who testified that when Alpert decided to join the scheme, Vincent Gugliaro began to represent Alpert and others of the "Brooklyn Group" at meetings with Dioguardi, Hellerman and Taylor at Gatsby's restuarant, where Gugliaro vouched for Alpert, the ground rules were set for the sharing of profits between the "Brooklyn Group" and Dioguardi, Hellerman and Taylor, and other problems were ironed out. Taylor also testified that after the scheme began to falter, sometime in late January or early February 1970, Gugliaro received $10,000 at Gatsby's as his group's share of the profits.*

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* In addition to Taylor's testimony, James LaRocca testified that he had been told by Bernard Weiss that someone named "Little Vinnie" (Taylor's name for Gugliaro) represented the interests of Alpert and Weiss at the "sitdowns" at Gatsby's and that on one occasion at Taylor's office when a problem arose,

[Footnote continued on following page]

The evidence at the second trial was essentially the same * as at the first with the addition of Alpert's testimony. Alpert testified to various meetings held by the "Brooklyn Group" at the Potpourri restaurant where he and Weiss would register complaints with Gugliaro, who was in turn to take them up with Dioguardi at meetings at Gatsby's. Alpert testified that he received $5,000 to split between himself and Weiss of the $10,000 received by Gugliaro at Gatsby's.

At the first trial, Gugliaro took the stand to deny, among other things, his association with any such conspiracy; he denied even knowing some of the conspirators and alleged that his acquaintance with other conspirators was incidental and nonconspiratorial. At his second trial, Gugliaro did not take the stand and limited his defense to calling a character witness and to challenging the sufficiency, consistency, and credibility of the Government's proof.

The instant indictment charged Gugliaro with having given perjured testimony in his first trial.

B. The Government's Case.

The Government's proof showed that on December 13, 1971, while testifying under oath in his own behalf at the Imperial I trial, Gugliaro denied the following: that he

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Erwin Layne made a telephone call to arrange a "sitdown". A toll call made around the time of that incident from Taylor's office to the union office where Gugliaro was employed was introduced into evidence. Jack Kelsey, an associate of Hellerman, testified that he had been at a Gatsby's meeting with Dioguardi about Imperial attended by several "Vinnie's", and while he could only make an in-court identification of Vincent Aloi (Gugliaro's boss according to the Government's theory), he identified a photograph of Vincent Gugliaro as one he had previously selected from a spread of photographs and had identified as someone who had attended the Gatsby's meeting.

* Jack Kelsey did not testify at the second trial.

talked about Imperial stock with Hellerman, Taylor, Dioguardi, Alpert, Weiss, Tramunti, Layne and Bonodono in 1969 and 1970 (Count One), that he met and talked with Murray Taylor (Count Two), that he had dealings with Weiss other than a purchase of lamps from Weiss' store (Count Three), that he had been in the Potpourri restaurant and had seen Weiss in that restaurant on more than one occasion (Count Four), that he had met Hellerman at Gatsby's restaurant on more than one occasion (Count Five), that he had heard of and knew Alpert in 1969 and 1970 (Count Six), and that he received $10,000 from Hellerman and discussed Imperial stock at a meeting at Gatsby's restaurant in February, 1970 (Count Seven) (Tr. 670-678).*

The Government established through the testimony of Bernard Weiss, Ronald Alpert and Michael Hellerman that on many occasions from November, 1969 through approximately late January, early February, 1970, at the Potpourri restaurant in Brooklyn and at Gatsby's restaurant in Manhattan, Gugliaro met with them and others to discuss Imperial stock.

Specifically, the Government proved that in late October or the beginning of November 1969 Murray Taylor, who together with Hellerman, Dioguardi and others had been engaged in manipulating the price of Imperial stock, approached Ronald Alpert and Bernard Weiss at the Potpourri restaurant and asked him to join in the ongoing scheme to manipulate Imperial. Alpert was hesitant and non-committal but was prevailed upon by his and Weiss' mutual friend, Philip Bonodono, to consider Taylor's proposition because Bonodono had a friend, Vincent Gugliaro, who could participate in negotiations with John Dioguardi (Tr.

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* References prefixed "Tr." denote pages in the trial transcript of the case at bar, and "Imperial I Tr." and "Imperial II Tr.", denote pages in the trial transcripts of the Imperial I and II, trials respectively. "GX." and "DX." refer respectively to Government's and Defendant's Exhibits at this trial.

56-59, 67, 290-292).* Shortly thereafter Gugliaro attended two meetings at Gatsby's with John Dioguardi, during which plans regarding the future manipulation of Imperial stock were discussed. It was at these meetings that the defendant Gugliaro first met Taylor and Hellerman (Tr. 295-296, 417-424).** After these two meetings a pattern was established in which Alpert and/or Weiss (who both began to actively manipulate Imperial stock) met with Gugliaro at the Potpourri to discuss problems or complaints with Gugliaro (Tr. 70-76, 80-81, 295-307, 313-318), who then, together with Layne and Bonodono, would discuss these problems and complaints with Dioguardi, Hellerman and Taylor at meetings in Gatsby's (Tr. 480-484, 486-488, 490-491, 525).*** Weiss and Alpert (who owned the Potpourri in partnership with one other person Tr. 55-56, 289, 335), testified that Gugliaro was at the Potpourri on numerous occasions from October-November 1969 through February 1970, usually in connection with Imperial (Tr. 85, 137-138, 337-338, 466). Hellerman testified to about 10 different meetings at Gatsby's with Gugliaro during the same time period (Tr. 418, 479, 481, 486, 487, 490-492, 495, 521-524).

Eventually, as the manipulation was nearing its end, there was a meeting at Gatsby's at which Hellerman gave Gugliaro $10,000, which represented his group's share of the profits of the manipulation (Tr. 492-495) and Gugliaro later split that money with Alpert, Weiss, Bonodono and

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* At this time, Weiss already knew Gugliaro, whom he had met through Bonodono (Tr. 68-70).

** The first meeting at Gatsby's took place while Hellerman was in Puerto Rico. In attendance with Dioguardi were Carmine Tramunti, Murray Taylor and Jack Kelsey—an associate of Hellerman's. Gugliaro attended with Bonodono and Erwin Layne. Hellerman was recalled from Puerto Rico by Dioguardi and the second meeting at Gatsby's took place with the same individuals, plus Vincent Aloi (Gugliaro's boss) and minus Tramunti (Tr. 415-419, 421, 423).

*** Dioguardi would not permit Weiss or Alpert to attend any of the Gatsby's meetings (Tr. 74-75, 304-305, 489).

Layne (Tr. 81-84, 319-322).* Thereafter, Gugliaro had several meetings with Weiss on the one hand and with Hellerman and Dioguardi on the other in an effort to determine whether his group had been cheated by Hellerman (Tr. 85, 495-496).

In addition to the foregoing, Weiss testified that after Gugliaro took the stand at Imperial I and denied ever having been at the Potpourri, Gugliaro expressed a fear that the prosecution would be able to disprove this testimony by producing witnesses to testify that he had in fact frequented the Potpourri (Alpert, Weiss, Bonodono and Layne were of course on trial with Gugliaro in Imperial I), and stated that if this were done he would in turn testify that he had made an innocent, honest mistake when he denied ever being at the Potpourri, because he was unfamiliar with that name, having frequented the restaurant when it was called Chez Joey and before the "Potpourri" sign was installed (Tr. 89-90).

Weiss and Alpert both testified that the sign "Potpourri" was installed sometime in October 1969 and that the restaurant closed in May, 1970 (Tr. 85, 90-91, 322, 336-337, 466). To corroborate the testimony of Weiss, Alpert and Hellerman that Gugliaro had been at the Potpourri, the Government called two former employees of that restaurant. Francis Sanoff testified that after being a customer of Chez Joey she was employed there by the new owners—Alpert and Weiss—as a hat-check girl and at that time met Gugliaro when he came into the restaurant with a friend of hers (Tr. 606-609).** She testified that she saw Gugliaro at the

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* Alpert recalled that Gugliaro split the $10,000 five ways among Alpert, Weiss, Bonodono, Layne and himself (Tr. 321-322, 354). Weiss recalled that a share of money was put aside by Gugliaro for "86th Street." Weiss was not permitted to testify before the jury that that phrase referred to Joseph Columbo (Tr. 84).

** This had to have occurred sometime after September, 1969, because the restaurant did not open under the management of Weiss and Alpert until that date (Tr. 466, 607).

restaurant on several occasions, both with and without that friend (Tr. 608-609). Mrs. Sanoff was not sure of the date on which the "Potpourri" sign was installed but recalled that it might have been in February 1970 (Tr. 612, 614-615).

Lucille Cicalo testified that she worked as a waitress first at Chez Joey and then for Alpert and Weiss. She recalled seeing Gugliaro at the restaurant two Friday evenings a month from September 1969 until the restaurant closed at the end of May, 1970 (Tr. 617-620). It was her recollection that the "Potpourri" sign was installed sometime in January or February, 1970 (Tr. 617, 622).

C. The Defense Case.

During the Government's case, the defense introduced documents from the State Liquor Authority which reflect that when Alpert and Weiss first applied for a liquor license for their newly acquired restaurant in June 1969, they did not list any name for that restuarant (DX. I; Tr. 667). A photograph of the restaurant taken in May 1969, wtih the sign "Chez Joey," was attached to this application (DX. G; Tr. 611-613, 664). A yearly renewal application, submitted on January 14, 1970, reflects that on that date the restaurant was already known as the Potpourri DX. I; Tr. 668).

The defendant did not call any witnesses. In summation he vigorously attacked the credibility of Hellerman, Alpert and Weiss and in addition argued with respect to Count Four that Gugliaro told the truth when he denied ever having been at the Potpourri because there was insufficient proof that he had been at the restaurant when it was known by that name.

ARGUMENT

POINT I

Collateral estoppel did not bar Gugliaro's prosecution for perjury, and his false testimony was material.

The defendant claims that collateral estoppel acts as a bar to this perjury prosecution and specifically to his conviction on Count Four, arguing that the jury's verdict of acquittal at Imperial II necessarily decided the issues presented in this prosecution in his favor. This argument is without merit, because it cannot be said that the jury in Imperial II necessarily determined the issues presented in this prosecution or if it did, that they were decided favorably to Gugliaro.

Incorporated in the Constitutional guarantee against double jeopardy is the doctrine of collateral estoppel: "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future [prosecution]." *Ashe* v. *Swenson*, 397 U.S. 436 443 (1970). *Accord*, *Sealfon* v. *United States*, 332 U.S. 575, 578 (1948). But nothing in this doctrine purports to bar every future prosecution bearing some relation to some past one, and it is well established that an acquittal of a defendant for substantive offenses does not bar his prosecution for perjury, *e.g.*, *United States* v. *Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969); *Adams* v. *United States*, 287 F.2d 701, 705 (5th Cir. 1961). To the contrary, the burden is upon the defendant, *United States* v. *Friedland*, 391 F.2d 378, 382 (2d Cir. 1968); *United States* v. *Feinberg*, 383 F.2d 60, 70 (2d Cir. 1967), to show with certainty that the jury's verdict at the prior trial necessarily decided the issues presented by the later prosecution.

Since a jury typically renders a general verdict, "'(t)he defense of collateral estoppel will not often be available to a criminal defendant . . . because it is not often possible to determine with precision how the judge or jury has decided any particular issue.'" *United States* v. *Cioffi*, 487 F.2d 492, 499 n. 8 (2d Cir. 1973) (Friendly, *C.J.*), *cert. denied* as *Ciuzo* v. *United States*, 42 U.S.L.W. 3629 (May 13, 1974).

The test, as laid down by the Supreme Court, is that: "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude *whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.*'" *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444 (emphasis supplied). *E.g.*, *Sealfon* v. *United States*, *supra*, 332 U.S. at 578-79; *United States* v. *Zane*, Docket No. 73-2401 (2d Cir. April 1, 1974), *slip op.* at 2504-2505; *United States* v. *Gremillion*, 464 F.2d 901, 906 (5th Cir. 1972). Thus, in order to prevail here Gugliaro must establish that by applying this analysis it is possible to determine with certainty, *Cioffi*, *supra*, 487 F.2d at 498, that the jury in Imperial II necessarily decided the facts essential to his conviction for perjury in his favor, to wit, that he had never been in the Potpourri and had never seen Weiss there.*

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* The issue is not whether a jury by its verdict has determined that a defendant has testified truthfully and is therefore innocent of the charge of perjury, but whether a perjury prosecution would require relitigation of specific fact issues which have already been determined favorably to the defendant. *See, e.g., Adams* v. *United States*, *supra*, 287 F.2d at 703. Thus, obviously the Government cannot prevail on the issue of collateral estoppel simply because Gugliaro was acquitted at a trial (Imperial II) in which his credibility was not in issue because he did not testify.

Gugliaro contends that the jury at Imperial II, in acquitting him of conspiracy,* necessarily rejected Ronald Alpert's testimony about his meetings with Gugliaro and Weiss at the Potpourri.** This argument cannot bear scrutiny. A careful analysis of the Government's evidence, summations of defense counsel and the Court's charge in Imperial II readily discloses that Gugliaro's acquittal of conspiracy could have resulted from a variety of determinations by the jury not requiring a finding that Gugliaro had never been at the Potpourri or seen Weiss there. Stated another way, for the reasons that follow the jury could have believed that Gugliaro had been to the Potpourri and

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* Gugliaro does not and cannot contend that the Imperial I jury verdict operates as a bar to his prosecution for committing perjury at that trial. While he was acquitted of the substantive charges, the jury's disagreement on the conspiracy count made it perfectly clear that they had made no determination as to the facts which were in issue in the conspiracy count, and thus no determination about the facts which were in issue in the case at bar. (Virtually all the evidence about Gugliaro introduced at Imperial I both by the Government and by Gugliaro in his testimony related to the conspiracy count and the Government relied on the *Pinkerton* doctrine to support the substantive charges). There was thus no collateral estoppel bar to Gugliaro's retrial on the conspiracy count. *See, e.g., United States* v. *Zane, supra,* slip op. at 2503; *Cioffi, supra; United States* v. *Pappas,* 445 F.2d 1194, 1199 (3d Cir. 1971); *United States* v. *Williams,* 341 U.S. 70, 95 (1950) (dissenting opinion). So the only issue is whether Gugliaro's innocence of the conspiracy charge can be reconciled in any way with a subsequent finding that he testified falsely. *Adams* v. *United States, supra,* 287 F.2d at 703.

** Murray Taylor and Alpert were the main Government witnesses against Gugliaro at Imperial II. Only Alpert testified to meeting with Gugliaro and Weiss at the Potpourri. Taylor testified to meetings with Gugliaro at Gatsby's (See *Statement of Facts, supra*).

had seen Weiss there, yet still acquitted Gugliaro of conspiracy to commit stock fraud and mail fraud.*

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* Thus the defendant's reliance on *Harris* v. *Washington*, 404 U.S. 55 (1971) and *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961) is misplaced. In *Harris*, the Government conceded that the same factual issue would be relitigated at defendant's second trial as had been litigated at the first, and thus the Court properly held that collateral estoppel barred the second prosecution. As for *Kramer*, it was, in the words of Judge Friendly (who wrote the *Kramer* opinion), "the rare case where it was possible to determine what the jury in the earlier prosecution had decided." *United States* v. *Cioffi*, *supra*, 487 F.2d at 498. Specifically, in *Kramer*, a prosecution for conspiracy to burglarize was held barred by collateral estoppel only because the factual setting at the defendant's earlier trial for burglary and aiding and abetting was peculiarly such that the jury, in acquitting, necessarily settled not only that the defendant did not commit the acknowledged burglary but also that he was not in any way responsible for whoever did, for "[u]nlike many other criminal cases this one was devoid of alternative possibilities." *United States* v. *Kramer*, 289 F.2d at 914. *See also Turner* v. *Arkansas*, 407 U.S. 366, 369 (1972).

More in point are those cases in which, like the case at bar, there were possible alternatives for the jury's acquittal which did not involve a determination of the facts in issue in the subsequent trial. In *United States* v. *Williams*, 341 U.S. 58 (1951) also a perjury prosecution, three defendants challenged on res judicata grounds their perjury convictions arising from their testimony at their former trial for beating prisoners, conspiring to beat prisoners, and aiding and abetting the beating of prisoners. At that trial, they had been acquitted of the substantive and aiding and abetting counts and there was a jury disagreement on the conspiracy counts. The Supreme Court held that no res judicata operated to bar their perjury convictions, since the perjured testimony was that they had not *seen* a fourth defendant, Williams (who had been convicted) beating the prisoners:

> "An acquittal of [beating the prisoners] or of aiding and abetting was certainly not a determination that [the three defendants] did not see Williams assaulting the prisoners." 341 U.S. at 65.

See also United States v. *Cioffi*, *supra*; *United States* v. *Haines*, 485 F.2d 564 (7th Cir. 1973); *United States* v. *Gremillion*, *supra*; *Adams* v. *United States*, *supra*; *cf. United States* v. *Manfredonia*, *supra*, 416 F.2d at 764.

For example, the jury may have found that the Government proved several conspiracies rather than one and that Gugliaro had to be acquitted because he was not a member of the single conspiracy charged in the indictment. *See, United States* v. *Lopez*, 420 F.2d 313 (2d Cir. 1969); *cf. United States* v. *Zane, supra*, slip op. at 2503-2505. The jury was instructed on the issue of multiple conspiracies (Imperial II Tr. at 6603-6605, 6522)* and it was forcefully argued to the jury in one defense summation (Imperial II Tr. at 6188-6170, 6522). Thus the jury may have determined that Alpert testified truthfully about Gugliaro's participation in the Imperial stock manipulation but that nevertheless Gugliaro had to be acquitted because he was not a member of a single integrated scheme. Or the jury may never have reached any decision on the credibility of Alpert's testimony if they made an initial decision that even if any conspiracy existed to which Alpert and Gugliaro were

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* Following is a portion of the Court's charge on the multiple conspiracy issue (Imperial II Tr. at 6604-6605):

> "However, if you find that the evidence does not show one overall conspiracy but instead shows the existence of a number of separate and independent conspiracies, as some of the defendants here have argued to you, each with its own aims and objectives and each with its own separate nucleus or core of conspirators, then you would have multiple conspiracies, and the government would have failed to establish the single overall conspiracy as charged, and it would be your duty to acquit the defendants on the charge of conspiracy.
>
> Although it is necessary that you find a single, overall conspiracy existed, it is not necessary that you find that all of the defendants were members of such a conspiracy in order to convict those defendants whom you find to have been members. If you find that one or more of the defendants was a member of a single conspiracy, the one charged in the indictment, and the other defendants were not, you may find those defendants who were members guilty of the conspiracy charged. You must find a defendant who was not a member of that single conspiracy, should you so find, not guilty of the conspiracy charge."

parties, it was separate and independent from the single conspiracy charged in the indictment and therefore acquittal was warranted.* This view is strongly supported by the Supreme Court's decision in *Sealfon* v. *United States, supra.* In that case the Government sought to avoid the effects of collateral estoppel from a prior acquittal of conspiracy on a subsequent conviction for a related substantive offense with the argument that the jury at the conspiracy trial might have acquitted the defendant because it found that he had participated not in the broad conspiracy charged in the indictment but rather in a more limited one. The Court rejected the Government's argument, but it did so on the ground that the trial judge's charge had not required the jury to find Sealfon's participation in the broader conspiracy; had such a charge been given, it seems clear that the result in *Sealfon* would have been different. 332 U.S. at 579-580. Here, on the other hand, the trial judge in Imperial II gave precisely the kind of charge which would have changed the result in *Sealfon*, for he instructed the jury that it must acquit Gugliaro if it found that the Government had proved multiple conspiracies and that Gugliaro was not a member of the conspiracy charged in the indictment.

Alternatively, the jury may have determined that Gugliaro did indeed frequent the Potpourri, see Weiss there and even attend meetings at which the manipulation of Imperial was discussed, but that he merely associated with these people and was not involved in a criminal conspiracy. In other words the jury may have credited Alpert's testi-

* Sixteen defendants and twelve co-conspirators were named in the conspiracy count and the Government's proof established several phases of a manipulation which began in Florida in January, 1969 and involved people who Gugliaro never heard of and never met. One of these people was the defendant Frank who was on trial with Gugliaro at Imperial II.

mony in part and rejected it in part.* Cf. *United States* v. *Zanfardino,* Dkt. No. 73-2516 (2d Cir. April 26, 1974). That Alpert (and Taylor) may have implicated their acquaintances in the conspiracy in order to curry favor with the Government was an argument presented by the defendant Gugliaro's summation:

> ". . . did it ever occur to you that no matter how they picked those names and by whatever design, I mean like an Alpert or a Taylor, they didn't pick my name, they didn't pick the names of some of these people out there, they had to pick some people who knew each other and people who know each other do have a tendency sometimes not only to call but to visit with each other" (Imperial II Tr. at 6260).

This line of argument echoed Gugliaro's opening statement where he protested that even if he had been present at some meetings as charged by the Government's witnesses or had some dealings with co-defendants, his activities in this regard

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* The jury was given the standard instruction on credibility that:

> "It is for you to say whether a witness' testimony at this trial was truthful or untruthful, and if untruthful, whether it was untruthful in whole or in part.
>
> If you find that any witness has testified falsely here as to any material matter, you may reject the entire testimony of that witness or you may reject such portion of it as you find false and accept such portion of it as you believe to be true." (Imperial II Tr. at 6500).

The jury was also instructed that:

> "I want to caution you that mere association with one or more of the conspirators does not make one a member of the conspiracy. Nor is knowledge without participation sufficient. What is necessary is that the defendant you are considering be found to have participated with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends." (Imperial II Tr. at 6597-6598).

See generally United States v. *Williams,* 341 U.S. 58, 64, n. 4 (1951).

had been entirely innocent and lacking in criminal intent: "He just happened to have the misfortune of being at New Gatsby's Restaurant at that particular time to speak to Mr. Dioguardi. That's it. That's it" (Imperial II Tr. at 337). The defendant Bonodono also argued that even if the jury accepted the testimony of Alpert and Taylor that he had attended meetings at the Potpourri and at Gatsby's the jury should acquit because there was no evidence that he participated in any conversations that took place at those meetings (Imperial II Tr. at 6139-6141, 6143, 6146, 6149, 6156, 6509-6510).

A similar possibility is that the jury accepted most of the evidence with respect to Gugliaro's participation in the events surrounding the conspiracy but decided that his only function was to mediate for some friends who were involved in a stock manipulation and that in that role he was just a casual participator who lacked the requisite criminal intent to be a member of the conspiracy. Along these lines, Gugliaro argued both in his opening remarks and in summation that the Government's proof was insufficient because there was no proof that he had ever purchased any stock:

> "They never showed you that Gugliaro had ever bought a share of stock, knew anything about stocks" (Imperial II Tr. at 6253. See also opening remarks, Imperial II Tr. at 334-335).

This theory was vigorously pressed in another summation argument that the testimony of Alpert and Taylor about the subject matter of the meetings was so inconsistent that it should be rejected. If the jury accepted this argument it may well have acquitted Gugliaro on the ground that such inconsistent accounts of what occurred in meetings with Gugliaro raised a reasonable doubt as to what criminal activities, if any, transpired at these meetings. Such a determination would not involve a finding that the

meetings did not occur (Imperial II Tr. at 6253-6259, 6532).

Gugliaro's reliance on the testimony of a character witness could also have led the jury to accept Alpert's testimony about Gugliaro's presence at the Potpourri, but to reject his testimony, upon consideration of the character evidence, on the issue of criminal intent, that is, on the issue of whether he knowingly participated in a conspiracy. The usual charge on character testimony was given by the Court (Imperial II Tr. at 6608-6609, 6533, 6248.*

In sum, it is obvious from the foregoing alternative possibilities that Gugliaro's acquittal of conspiracy was in no way necessarily a jury determination that he had never been in the Potpourri or seen Weiss there, and the verdict of the jury in the case at bar convicting Gugliaro of perjury is the first time those two facts have been "necessarily determined" by any jury.**

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* In short, this case is unlike *Kramer*, where "it [was] quite impossible, for example, to explain the acquittal on a basis that although Kramer was at the post offices, he was a by-stander or thought his mission innocent, or on a view that although he participated in the planning he was not sufficiently important or causative, or guilt-conscious, to be an aider and abetter", 289 F.2d at 915.

** Gugliaro does not contend on this appeal that even if collateral estoppel did not bar the perjury prosecution, collateral estoppel should have prevented the Government from reintroducing certain evidence tendered at Imperial II at the perjury trial, on the grounds that certain facts were concluded in his favor by the conspiracy acquittal. *See, e.g., United States* v. *Cioffi, supra,* 487 F.2d at 498; *United States* v. *Kramer, supra,* 289 F.2d at 918. In other words, for example, he does not argue that although the Government was entitled to prove that he knew Weiss, Alpert and Hellerman, met and saw Weiss at the Potpourri and discussed the Imperial stock manipulation with them, the Government should have been precluded from proving the details of conversations at the various meetings which were clearly relevant as background

[Footnote continued on following page]

Gugliaro next contends that if it is possible that the Imperial II jury did not necessarily decide whether he had ever been at the Potpourri or seen Weiss there, or decided those facts unfavorably to him, yet acquitted, it follows that these facts must not have been material at the Imperial I trial and therefore the indictment must be dismissed because the element of materiality is absent. This contention is a *non sequitur* whose application would preclude prosecution for perjury in every case related to a prior acquittal and disregard well established law regarding materiality.

Gugliaro's theory is incorrect because the possibility that a jury did not make a determination about certain facts in reaching its verdict does not render those facts and hence the testimony reciting those facts immaterial.* It is well established that for testimony to be material at a trial, it need not have necessarily had an effect on the outcome of the trial—indeed the ultimate disposition of the trial is irrelevant, for "the federal statute against perjury is not directed so much at its effect as at its perpetration; at the probable wrong done the administration of justice by false testimony." *United States* v. *Williams, supra,* 341

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material and on the issue of motive on the perjury charge. If such a contention were made it would have to be rejected for the same reasons that collateral estoppel did not operate as a bar to this prosecution. To repeat one example discussed *supra* at p. 13, since it was possible for the Imperial II jury to have acquitted on the grounds of multiple conspiracies, all the evidence of Gugliaro's conduct introduced at Imperial II was admissible at his subsequent trial for perjury because the facts were not necessarily resolved in his favor at Imperial II. Gugliaro does, however, contend that because all these facts were reintroduced, the jury should have been advised of his acquittal. See Point II, *infra.*

* Even assuming *arguendo* that defendant's theory was correct, it would be inapplicable to this case because at the Imperial I trial (which is of course the trial at which Gugliaro's testimony had to be material) no determination at all was made by the jury about any facts relevant to the conspiracy count including the fact of Gugliaro's presence at the Potpourri, because the jury disagreed.

U.S. at 68; *accord, United States* v. *Manfredonia, supra,* 414 F.2d at 764. Thus a false statement need not be dispositive of the inquiry in question or even material to the main issue; rather the test is simply whether or not the false testimony was capable of influencing the tribunal or trier of fact on the issue before it. *See, e.g., United States* v. *Birrell,* 470 F.2d 113, 115 n.1 (2d Cir. 1972); *United States Gremillion, supra,* 464 F.2d at 905; *United States* v. *Whitlock,* 456 F.2d 1230, 1232 (10th Cir. 1972); *United States* v. *Rivera,* 448 F.2d 757, 758 (7th Cir. 1971); *Barnes* v. *United States,* 378 F.2d 646, 649-650 (5th Cir. 1957); *United States* v. *Weiler,* 143 F.2d 204, 206 (3d Cir. 1944), *rev'd. on other grounds,* 323 U.S. 606 (1945); *Blackmon* v. *United States,* 108 F.2d 572, 573-574 (5th Cir. 1940).* This test is unquestionably satisfied in the present case. Indeed, the result of Gugliaro's argument is that an acquitted defendant can never be indicted for perjury at his trial for in every case where collateral estoppel does not operate as a bar to a later perjury prosecution, materiality must.** This is obviously not the law. *See, e.g., United States* v. *Wil-*

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* The defendant's argument that *United States* v. *Mancuso,* 485 F.2d 275 (2d Cir. 1973) established a new standard for materiality at a trial, requiring that the testimony "bear upon the ultimate question of guilt or innocence" is without merit.

** Although not raised as a legal contention on this appeal, the notion runs through Gugliaro's brief on appeal that regardless of principles of double jeopardy or collateral estoppel there is something fundamentally unfair about indicting someone acquitted of an underlying charge, for perjury (App. Br. at 12). It is respectfully suggested that such righteous indignation is sorely misplaced, for to "[allow] an acquittal to afford any such insulation for perjury will be giving defendants an uncontrollable license to testify falsely", *Adams* v. *United States, supra,* 287 F.2d at 703; *United States* v. *Manfredonia, supra,* 414 F.2d at 764. Moreover, it is perfectly clear that Justice Brennan's view that the Constitution requires joinder for all charges arising out of a "single criminal act, occurrence, episode or transaction" is not applicable to a prosecution for perjury which is an entirely different transaction. *United States* v. *Gremillion, supra,* 464 F.2d at 906. *See, United States* v. *Cioffi, supra,* 487 F.2d at nn. 4 & 5.

liams, supra, 341 U.S. at 65; *United States* v. *Haines, supra; United States* v. *Manfredonia, supra; United States* v. *Adams, supra.*

It is evident that highly material to Gugliaro's involvement in the Imperial conspiracy was whether he had dealings with co-conspirators including Weiss (and Alpert), what kind of dealings and where. Admission by Gugliaro of contacts with Weiss, particularly in the Potpourri, which Weiss owned and where a conspiratorial meeting took place, clearly could have affected the jury's determination as to Gugliaro on the conspiracy count. Thus by denying he had seen Weiss in the Potpourri and that he had ever been there, Gugliaro effectively cut off any further questioning as to whether he had any incriminating contact with Weiss. These false answers were clearly capable of influencing the trier of fact since truthful answers would have led to further cross-examination as to the nature of Gugliaro's contacts with Weiss and with Alpert, his partner.

POINT II

The trial court properly excluded as irrelevant the fact of Gugliaro's acquittal of stock fraud.

Gugliaro contends, without citation of authority, that it was error not to inform the jury that he was acquitted at the Imperial I and Imperial II trials. This argument is without merit, because the verdicts at the two trials were not probative of the issues at the perjury trial and not otherwise admissible on vague notions of fairness.

On numerous occasions throughout the trial, Judge Wyatt instructed the jury not to speculate on the outcome of the Imperial I trial * and that Gugliaro was not on trial

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* The Imperial II trial was mentioned before the jury only briefly and by the defense, in its cross-examination of Alpert (Tr. 383).

for stock fraud (Tr. 32, 56, 66, 819-820). He declined repeated requests by Gugliaro to advise the jury about the acquittals on the ground that the results of the Imperial I and II trials were irrelevant.

Gugliaro did not below and does not on appeal offer any explanation of the relevance of the results of Imperial I and II. Rather, he contends that (1) because some of the evidence admitted at his perjury trial related to the Imperial manipulations, the jury should have been told that he had been acquitted of that manipulation; and (2) because the jury was not instructed that he had been acquitted on the Imperial indictment, they may have disregarded the Court's instructions not to speculate and assumed that he was convicted.*

Gugliaro's first argument fails here for the same reasons that his argument on collateral estoppel must be rejected. As noted in Point I, *supra*, the jury's verdict in Imperial II was not necessarily a finding in Gugliaro's favor of any of the facts in issue at the perjury trial, and it follows that evidence of the jury's determination at that trial was not probative of the determination the jury was called upon to make at the perjury trial. See *People* v. *Davidson*, 227 Cal. App. 331, 38 Cal. Rptr. 660, 663 (1964). Were it clear that the Imperial II jury had determined in Gugliaro's favor any fact sought to be litigated at Gugliaro's perjury trial, plainly the proper course would have been the exclusion of the evidence and not the admission of the acquittal with the evidence at the perjury trial, for as evidence at trial it is clearly incompetent and inadmissible:

> ". . . [I]f perjury occurs in a criminal trial, the judgment of conviction or acquittal is not admissible in a subsequent perjury trial. This is because it obvi-

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* Prior to trial the Government suggested that as insurance against such speculation the Government would consent to limiting the proof at trial to a description of Gugliaro as a witness at Imperial I, thereby concealing the fact that he was a defendant. (See Government's Pre-Trial Memorandum, p. 5; Tr. 2-3). That suggestion was rejected.

> ously introduces to the jury hearing the perjury case the plainly collateral issue as to whether the jury in the prior criminal trial believed or disbelieved the allegedly perjured testimony." [citations omitted]

Gordon v. *State,* 104 So. 2d 524, 535 (Fla. Sup. Ct. 1958). But *cf. People* v. *Griffin,* 58 Cal. Rptr. 107, 110-111 (Cal. Sup. Ct. 1967); *Nolan* v. *State,* 213 Md. 298, 311, 131 A.2d 851, 857 (1957).* Introduction of the prior acquittals would have only had a tendency to mislead and deflect the inquiry of the jury in the perjury trial.

The second ground pressed by Gugliaro—that because the jury was told not to speculate about the outcome of Imperial I instead of being told of its result, the jury may have decided that Gugliaro had been convicted—is equally without merit. There is nothing in the record which supports Gugliaro's hypothesis, and, indeed, the fact that the jury convicted him on only one of the perjury counts charged strongly suggests the contrary. Moreover, while the jury's hearing of highly prejudicial information may not always be cured by a cautionary instruction, *e.g., Bruton* v. *United States,* 391 U.S. 123 (1967); *United States* v. *Semensohn,* 421 F.2d 1206 (2d Cir. 1970), there is no reason to assume, as Gugliaro does, that a jury is unable to obey an instruction not to speculate about a fact concerning which it has no information. *See, Bruton* v. *United States, supra,* 391 U.S. at 135. The matter was properly one for the trial judge's discretion, which cannot be said to have been abused by his conclusion that a cautionary instruction was appropriate in the context of this case.

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* Both *Griffin* and *Nolan* are unusual in that the prior acquittals there involved were in other jurisdictions and therefore could not have the effect of collateral estoppel. However, neither of those cases explains with any clarity the precise justification for the admissibility of prior acquittals, and a reading of the cases upon which they rely gives the impression that the doctrine of admission of acquittals was part of a rather primitive compromise arising out of the refusal of some courts to consider the facts of underlying prior acquittals in terms of collateral estoppel. In any event, neither *Griffin* nor *Nolan* was a perjury case.

POINT III

Weiss' status as an F.B.I. informant was irrelevant to this trial and was not suppressed by the Government; there was nothing in Weiss' testimony for the prosecutor to correct since he testified truthfully and the admission into evidence of a conversation Gugliaro had with Weiss during the Imperial I trial did not violate Gugliaro's Sixth Amendment right to counsel.

Gugliaro alleges that the Government deliberately suppressed exculpatory material when it failed to disclose that Bernard Weiss had been an F.B.I. informant prior to and during the Imperial I trial; that the prosecutor let allegedly false testimony by Weiss regarding the date of his cooperation with the Government go uncorrected, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1970); and that Weiss' status as an F.B.I. informant made him a "spy in the defense camp" and thus should have rendered inadmissible a conversation Weiss had with Gugliaro during the Imperial I trial. No suppression occurred because the Government disclosed Weiss' relationship with the F.B.I. to the Court. In addition, these arguments are without merit, because Weiss' status as an F.B.I. informant was irrelevant to the issues in this trial, because Weiss testified truthfully, and because Weiss was not a government "agent" who intruded into the defense camp during the Imperial I trial.

A. Facts.

Bernard Weiss was indicted in November, 1970 with the defendant Gugliaro and fourteen others for the manipulation of Imperial stock. Sometime after his indictment Weiss began to supply the F.B.I. with information about organized crime. He was not paid for this information but received partial reimbursement for out-of-pocket travel expenses he incurred. Weiss supplied no information to the F.B.I. about

the Imperial stock manipulation scheme for which he had just been indicted (Affidavit of Assistant United States Attorney John R. Wing, dated February 27, 1974; Government's Memorandum in Opposition to Defendant's Rule 33 Motion at 4; GX. 3501D). Weiss was specifically advised by the United States Attorney's Office that unless he pleaded guilty in the Imperial case and agreed to testify for the Government, the information which he supplied to the F.B.I. would be no assistance to him in either avoiding prosecution on Imperial or other matters, or in connection with his sentence, if he were convicted, for the Imperial manipulation. Nevertheless, Weiss refused to plead guilty in the Imperial case or to cooperate with the United States Attorney's Office but chose to relay occasional information about organized crime to the F.B.I. (Wing Affidavit, *supra*). Prior to the Imperial I trial, the Assistant United States Attorney in charge of the prosecution advised Judge Lasker and Weiss' attorney that Weiss had acted as an F.B.I. informant (Wing Affidavit, *supra*).

The conversation between Weiss and Gugliaro which Gugliaro contends is inadmissible occurred after Gugliaro had taken the stand at Imperial I. Gugliaro had just testified that he had never been in the Potpourri restaurant, and he told Weiss that he was afraid the Government would locate witnesses to contradict this testimony and if that occurred he would say that he had made an innocent mistake because he had known the restaurant not as the Potpourri but as Chez Joey (Tr. 87-90). Weiss himself later testified in his own behalf at Imperial I and denied his own involvement in any scheme to manipulate Imperial stock and testified that he had only met his co-defendant Gugliaro on two occasions, both at a furniture store (Imperial I Tr. at 6008-6009; Tr. 91, 175-205).

Weiss was convicted at the Imperial I trial. He was indicted during the Imperial I trial for another stock fraud. In March 1972 he was sentenced by Judge Lasker to eight months in prison, and at the time of sentencing the United

States Attorney's Office, although advising Judge Lasker that Weiss had supplied some information to the F.B.I., made a strong statement about Weiss' culpability and his failure to cooperate with this office in connection with the Imperial case and other cases (Wing Affidavit, *supra*).*

Sometime after Weiss' sentence in March 1972 and before the second Imperial trial in May 1972, Weiss advised Assistant United States Attorney John R. Wing of the conversation he had had with Gugliaro. This conversation was not introduced at Imperial II because Weiss, apart from relating that conversation, still refused to cooperate with the United States Attorney's office. In October, 1972, a third stock fraud indictment was filed naming Weiss as a defendant. Thereafter, in the Autumn of 1972, Weiss finally agreed to cooperate with this office, later pleading guilty to the two stock fraud indictments pending against him and testifying at various trials. In March, 1973 Judge Lasker reduced Weiss' sentence in Imperial I by suspending execution of the jail term. The United States Attorney's Office submitted two separate memoranda to Judge Lasker, one detailing his cooperation with this office and his expected cooperation (up until that date Weiss had only testified in the grand jury and not at any trials) and the other summarizing Weiss' cooperation with the F.B.I. The same two memoranda were submitted to Judge Charles L. Brieant, who in May, 1973 imposed a suspended sentence on Weiss upon his plea of guilty to the second stock fraud case. In June, 1973 Weiss pleaded guilty to the third stock fraud case and his sentence is still pending (Wing Affidavit, *supra;* Tr. 50-53; GXs. 3501C, 3501D, 3501E.**)

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* On cross-examination at this trial, Weiss recalled that the Assistant United States Attorney had recommended the maximum punishment to Judge Lasker (Tr. 121).

** GX 3501C is the memorandum to Judge Lasker regarding Weiss' cooperation with this office. GX 3501D is the memorandum to Judge Lasker regarding Weiss' cooperation with the F.B.I. GX 3501E consists of the same two memoranda as submitted to Judge Brieant.

In this case Weiss testified on direct examination to the conversation he had with Gugliaro during Imperial I * (Tr. 87-90). He also testified on direct examination that he began cooperating with the United States Attorney's Office in October 1972 (Tr. 91-92). At the end of his direct examination the prosecutor turned over for the Court's *in camera* inspection the memoranda submitted by the United States Attorney's Office to Judges Lasker and Brieant regarding Weiss' cooperation with this office and with the F.B.I. (Tr. 98-100; GXs. 3501C, 3501D, 3501E). Weiss testified that he had not seen any documents submitted by the Government to the Court but that he was simply advised that his cooperation with the United States Attorney would be made known and had been made known to both Judges (Tr. 52-53, 120-121, 125). Judge Wyatt ruled that the memoranda were not 3500 material and declined to rule on whether they in any way constituted *Brady* material, although requested to do so by the prosecutor (Tr. 99, 105).

Thereafter, on cross-examination, Weiss testified as follows: "Q. Now, when was it that you first decided to cooperate with the government, Mr. Weiss? A. I started to discuss with the U.S. Attorney September of 1972" (Tr. 119; see also, Tr. 205-207).

While the jury was deliberating in this case Weiss was a witness in another criminal case where certain state-

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* The defendant's insinuation that the prosecutor deliberately mislead him and the Court when she stated that she did not believe that the date of Weiss' cooperation was relevant to the admissibility of the conversation between Gugliaro and Weiss is frivolous, in view of the fact that several minutes later the prosecutor furnished the Court with the memorandum disclosing Weiss' cooperation with the F.B.I. Moreover, the prosecutor and the Court correctly perceived that the operative date regarding any violation of Gugliaro's Sixth Amendment right to counsel with respect to this prosecution was the date of the filing of the perjury indictment. See discussion *infra* at p. 31.

ments made by Weiss to the F.B.I. prior to his cooperation with this office were turned over to the defense as 3500 material because they related to the subject matter of Weiss' testimony at that trial. Trial counsel for Gugliaro, who obtained this material, claimed that he had not known that Weiss had been an F.B.I. informant and moved for a new trial on essentially the same grounds as he now raises on this appeal (Tr. 846-848).

In opposition to Gugliaro's motion for a new trial the Government submitted the affidavit of Assistant United States Attorney John R. Wing, who prosecuted the two Imperial cases, and the Government also relayed to the Court information obtained from the F.B.I. agent who had been in charge of Weiss during his year and a half as an informant. The facts presented to the Court were not disputed in any way by Gugliaro, who nevertheless maintained that accepting the facts as they were he was entitled to a new trial. This contention was rejected by Judge Wyatt.

B. Weiss testified truthfully in the case at bar and his status as an F.B.I. informant was irrelevant.

Gugliaro does not contend that the mere fact that a Government witness has furnished unrelated information to the F.B.I. is something which in and of itself is exculpatory apart from the facts of a particular case. Such a contention was rejected without comment by this Court in *United States* v. *Catalano*, 491 F.2d 268 (2d Cir. 1974), in which the Government did not disclose that a witness had been paid for information about possible violations of the Internal Revenue Code unrelated to the case in which he was testifying. Rather Gugliaro claims that the Government should have disclosed Weiss' status as an F.B.I. informant because it was exculpatory information in this case for a variety of reasons. These contentions are without merit.

First of all, the defendant's reliance on *Brady* is misplaced. An essential element to a Brady claim is prosecutorial *suppression* of exculpatory evidence, and there was no suppression here. On the contrary, the Government turned over a document showing defendant's status as an F.B.I. informant to the trial judge for *in camera* inspection and ruling under Section 3500 and *Brady*. "This conduct can hardly be classified as 'suppression'. *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

In addition, Gugliaro contends that Weiss perjured himself when he testified that he began cooperating with the United States Attorney's Office in September or October 1972 and the failure of the prosecutor to correct this perjury * requires a retrial under the principles of *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959) and *United States* v. *Lusterino*, 450 F.2d 572 (2d Cir. 1971). This contention must fail because Weiss' testimony was entirely truthful. He did not lie, fabricate, evade or conceal any information. He gave a truthful response to the prosecutor's question (Tr. 91-92) and to what he took to be the reasonable intendment of defense counsel's questions (Tr. 119, 205-207) about the date of his cooperation.** If defense counsel wanted to know

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* The prosecutor in this case obviously knew that Weiss had been an F.B.I. informant because she turned over the memoranda regarding this cooperation to the Court.

** Weiss' cooperation with respect to matters in which he was criminally involved, such as this case, only began when he started to cooperate with the U.S. Attorney's Office, and it was only after he began such cooperation that he received any consideration in connection with pending prosecutions and sentences. Moreover, the questions put to Weiss certainly seem to indicate that defense counsel was focusing on Weiss' cooperation with this office after his conviction on Imperial I (Tr. 205-207) and not on "cooperation" on unrelated matters which preceded his conviction. *See generally United States* v. *Rosner*, 485 F.2d 1213, 1226 (2d Cir. 1973).

whether Weiss, before he began cooperating with the United States Attorney, gratuitously passed information (having no bearing on Gugliaro or Imperial) to the F.B.I. he should have asked * and Weiss would have undoubtedly answered honestly, as he did a day or two later at the other trial.**

Gugliaro's contention that the F.B.I. report turned over as 3500 material in the other trial was also 3500 material in relation to this trial is frivolous. There is nothing in that document which even remotely relates to Weiss' testimony at this trial and nothing at all related to Gugliaro.***

Gugliaro also argues that he could have used the information that Weiss was an F.B.I. informant to his advantage at trial in two different ways. First, he could have strengthened his argument to the jury that Weiss' testimony as a defendant at Imperial I (where he exculpated himself and Gugliaro) was the truth as opposed to his trial testimony in the case at bar (where he of course inculpated himself and Gugliaro) by reasoning that as an F.B.I. informant Weiss must have been telling the truth. This argument is absurd. Although Weiss had given sane

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* At the very least, counsel, who has conceded that he was aware of the possibility that Weiss had cooperated with some government agency prior to the Imperial I trial (Transcript of Argument on Motion for a New Trial, Dated February 28, 1974, at 14-15), could have made an inquiry of the Government regarding this issue. His failure to do so appears to have been a tactical decision, yet he now accuses the Government of deliberate suppression of exculpatory evidence.

** In the course of questioning on cross-examination in *United States* v. *Gugliemini, et al.*, 73 Cr. 166 (S.D.N.Y.) Weiss readily admitted that he had been an F.B.I. informant but drew a very sharp distinction between his cooperation with the F.B.I. and his cooperation with the United States Attorney's Office (Exhibit E annexed to Gugliaro's motion for a new trial).

*** Judge Wyatt so ruled at the argument on the motion for a new trial, after he had examined the 3500 material produced at the Gugliemini trial (Tr. dated February 28, 1974 at 5-6).

intelligence information to the F.B.I., he was a defendant at the Imperial trial, and it could hardly be persuasively argued that he was telling the truth in a criminal prosecution brought against him by the Government simply because he had furnished a few bits of information, unrelated to the facts at trial, to the F.B.I. In the same vein Gugliaro argues that he should have been able to establish that although Weiss was an F.B.I. informant he did not report his conversation with Gugliaro about the Potpourri-Chez Joey to the F.B.I. and from that argue to the jury that the conversation was a recent fabrication by Weiss to curry favor with the Government. This argument is likewise absurd since had Weiss reported this conversation to the F.B.I. he would have disclosed his own perjury during that trial. In addition, Weiss had refused to cooperate in connection with the Imperial case. Moreover, Weiss was under instructions from the F.B.I., which he followed, issued shortly prior to the Imperial I trial, not to convey to them any information about that trial * (Government's Memorandum In Opposition To Defendant's Rule 33 Motion at 4).

In sum, Weiss did not testify falsely at this trial and his status as an F.B.I. informant was not relevant or exculpatory to Gugliaro. Even if this Court were to consider

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* Gugliaro claims that this "recent fabrication" argument is strengthened by that fact that Weiss, in June 1971, told the F.B.I. that he, Weiss, had told Alpert of a rumor regarding a plan by Dioguardi to have Hellerman blame Alpert for the Imperial scheme. (This is contained in the 3500 material furnished to the defense in the Gugliemini trial). Gugliaro argues that Weiss' reporting of this item to the F.B.I. yet not his conversation with Gugliaro supports the inference that the latter was a recent fabrication. This argument is without merit because the information conveyed by Weiss in June 1971 did not incriminate Weiss and was simply reported by Weiss in connection with a matter wholly unrelated to Imperial. Moreover, as is indicated, before the Imperial trial Weiss was instructed not to convey any information about it to the F.B.I.

Weiss' status as an F.B.I. informant as being possibly useful to the defendant a new trial would not be warranted because a new trial is required only if the evidence could ". . . in any reasonable likelihood have affected the judgment of the jury . . ." *Giglio* v. *United States, supra,* 405 U.S. at 154; *United States* v. *Brawer,* 482 F.2d 117, 136 (2d Cir. 1973); *United States* v. *Keogh,* 391 F.2d 138, 148 (2d Cir. 1969). The argument that Weiss fabricated his present testimony in order to curry favor with the United States Atorney's Office and gain reduced sentences and more limited prosecutions was argued by defense counsel in summation *ad nauseam,* and it is impossible to see how the allegedly suppressed *Brady* material would add anything of significance to this argument. It was "of minimal if any value in view of the ammunition already available to asault [Weiss'] credibility". *United States* v. *Pfingst,* 490 F.2d 262, 276 (2d Cir. 1974).*

C. Gugliaro's Sixth Amendment right to counsel was not violated at Imperial I or at this trial.

Gugliaro contends that Weiss' status as an F.B.I. informant violated Gugliaro's Sixth Amendment right to counsel during the Imperial I trial and should have resulted in the exclusion in this trial of the conversation between Gugliaro and Weiss regarding the Potpourri-Chez Joey sign. This argument is without merit because Weiss was a legitimate defendant in Imperial I and not a Government agent intruding into the councils of the defense, and moreover, because the conversation occurred in the absence of counsel and concerned Gugliaro's intent to commit an additional crime.

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* As in *Pfingst,* as a result of the material already available to impeach Weiss' credibility (as well as Alpert's and Hellerman's) the jury convicted Gugliaro only on the one count for which the Government presented independent evidence from non-accomplice witnesses. *United States* v. *Pfingst,* 490 F.2d at 278.

The evidence, not disputed below, is that Bernard Weiss was a legitimate criminal defendant at the Imperial I trial who was defending his own interests as such. Weiss was not sham defendant who was indicted to "lull a co-defendant by concealing an immunity already given", *United States* v. *Rosner,* 485 F.2d 1213, 1226 (2d Cir. 1973).* There can be no question but that despite Weiss' limited cooperation with the F.B.I. on other matters, the Government "meant business", *Id.,* with Weiss at Imperial I and treated him like any other defendant. Not only was he convicted at that trial and given an eight month prison term, but he was indicted twice more for other stock frauds. He was thus not a Government agent who intruded into the defense camp, and his status as an F.B.I. informant did not transform him into a Government agent.** The only issue is whether the conversation Gugliaro had with Weiss could be divulged to the Government long after the Imperial trial and used against Gugliaro.*** *Rosner, supra,*

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* Like *Rosner,* this case is completely distinguishable from the cases cited by the defense in which sham defendants were indicted and the deception was carried through when they thereafter testified falsely as either Government witnesses or as sham defendants about their participation in the crimes charged *e.g., United States* v. *Mele,* 462 F.2d 918 (2d Cir. 1972); *United States* v. *Rispo,* 460 F.2d 965 (3d Cir. 1972); *United States* v. *Lusterino, supra.*

** This case is on all fours with *Rosner, supra,* where the fact that Rosner's co-defendants had cooperated with the Government on unrelated matters did not transform them into agents " 'planted' by the Government to discover defense secrets", 485 F.2d at 1227, 1226 & n. 18.

*** This Court is not faced with the issue of whether had Gugliaro been convicted in Imperial I, Weiss' status as an F.B.I. informant would have required a new trial. However, it seems clear from *Rosner* that a *per se* rule would not be applied on that issue because Weiss was not a government plant, and that a new trial would have been warranted only upon a showing of prejudice. *United States* v. *Rosner, supra,* 485 F.2d at 1226-1228; *accord, United States* v. *Arroyo,* Dkt. No. 73-2193 (2d Cir., March 22, 1974), slip op. at 2321-2324; *United States* v. *Mosca,* 475 F.2d 1052, 1060-1061 (2d Cir.), *cert. denied,* 412 U.S. 948 (1973);

[Footnote continued on following page]

makes it clear that Gugliaro assumed the "risk of a subsequent disloyalty" by Weiss, 485 F.2d at 1227, and while the disclosure of a defendant's conversations with attorneys might give rise to a claim of privilege, a defendant's other statements have no such protection.

Moreover, even if Weiss had been planted by the Government to discover defense secrets, under *Hoffa* v. *United States,* 385 U.S. 293 (1966), his conversation with Gugliaro would be admisible at Gugliaro's perjury trial because it was not held in the presence of counsel and not a statement made in the legitimate defense of Imperial I. Indeed Gugliaro's statement to Weiss was a statement of an intent to commit perjury should the Government produce proof to contradict his earlier testimony. *See United States* v. *Hayles,* 471 F.2d 788, 792 (5th Cir. 1973). Finally, the proscriptions of *Massaiah* v. *United States,* 377 U.S. 201 (1964), are not called into play because Gugliaro had not been indicted for perjury at the time of the conversation. *See, e.g., Hoffa, supra; United States* v. *Hayles, supra; United States* v. *Edwards,* 366 F.2d 853, 872-873 (2d Cir. 1966), *cert. denied,* 386 U.S. 908 (1967); *cf. United States* v. *Poeta,* 455 F.2d 117, 122 (2d Cir. 1972).

POINT IV

The prosecutor's summation properly responded to defense counsel's closing arguments and did not deprive the defendant of a fair trial.

Invoking recent decisions of this Circuit, Gugliaro claims that certain remarks made by the prosecutor during summation were so improper that he was deprived of fair trial.

United States v. *Cohen,* 358 F. Supp. 112, 129 (S.D.N.Y. 1973). There was no prejudice demonstrable at the Imperial I trial because Weiss did not relate this conversation to the prosecutor until months after the trial had concluded, and there is no contention that Weiss relayed any information to the prosecutor during the course of the trial regarding either conferences with counsel or with the defendants alone.

Specifically he claims that: the prosecutor placed in issue her credibility and/or that of the United States Attorney's Office; improperly placed in issue the character of the defendant by hurling epithets at him; ridiculed the defense theories; improperly appealed to the community sense of law and order; commented on a matter not in evidence and misstated the law with respect to the anticipated missing witness instruction. These allegations lack merit. When each is scrutinized, it is clear that the prosecutor's summation was entirely within the bounds of propriety, based on the evidence and responsive to defense contentions, and indeed constituted a series of hard, but *fair* blows, to which the Government was entitled in presenting its case to the jury. *Berger* v. *United States*, 295 U.S. 78, 88 (1934).

It is important to point out at the outset that, except as to one minor factual assertion to which defense counsel objected during the summation (see p. 44, *infra*), he did not think the prosecutor's summation was objectionable enough to state his objections either prior to the Court's charge or before the jury retired to deliberate. Rather, before the jury retired he simply noted that he would place his objections on the record at a later time (Tr. 839). The appropriate time to object would have been immediately after the prosecutor's summation so that the Court could have given curative instructions if warranted. *See, United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *Cf. United States* v. *Pfingst*, 477 F.2d 177, 188-189 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). Defense counsel in effect remained silent until it was too late to do anything about his objections. This is no different from raising an objection to summation for the first time after a verdict has been returned. *See, e.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). Thus the standard in reviewing the Government's summation here must be that reversal can occur "only if the summation was so 'extremely

inflammatory and prejudicial' . . . that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings' [citations omitted]." *United States* v. *Briggs, supra,* 457 F.2d at 912.

1. The Credibility of the Prosecutor of Her Office.

The defendant contends that the prosecutor's reference to the Government's witnesses: ". . . if they are caught lying, they will be indicted for perjury" (Tr. 781), and more specific reference with respect to Alpert "if he perjures himself, he's in trouble" (Tr. 791), and the remark "what is the Government's beef against Vincent Gugliaro?" (Tr. 806), constituted improper prosecution argument because each was an attempt to bolster the credibility of the Government's witnesses through placing its prestige behind them. Rather than place in issue the integrity of the United States Attorney's Office or the prosecutor, these comments were proper argument on the credibility of the Government witnesses and merely met the defense "on a level of the defense's own choosing." *United States* v. *La Sorsa,* 480 F.2d 522, 526 (2d Cir.), *cert. denied,* 414 U.S. 855 (1973).

The entire thrust of the defense summation was an attack on the credibility of Alpert, Hellerman and Weiss as "con-men" who were not worthy of belief (*See, e.g.,* Tr. 730, 732, 733, 737, 742-745, 748, 752-757, 759, 764, 769, 771, 778) and who were testifying falsely in an effort to curry favor with the Government which had in turn rewarded them (and would reward them) with suspended or minimal sentences and fewer prosecutions (Tr. 730-731, 736-737, 744, 751-752, 758, 763). In addition, the defense argued that the witnesses had specifically implicated Gugliaro, rather than "John Jones" (Tr. 757-758) simply to please the Government (Tr. 730-731, 735, 737, 744, 757-758, 763-764). The implication of the latter argument was clear: not only were the witnesses testifying falsely and "conning" the Government but their false testimony had been solicited by

the Government, which got them to say what it wanted to hear (Tr. 735, 737, 744, 757-758). Gugliaro also specifically argued that the Government witnesses had lied at trial but would not be indicted by the Government for perjury:

> "By the way, based on this conflict of stories, it can't be both ways, one of them is lying, one of them is telling the truth. They are diametrically opposed stories, no in between.
>
> Do you think in the deepest recesses of your mind that either one of them is going to be indicted for perjury or expect to be by virtue of contradicting each other? Think about it when you consider their testimony and think about whether that would give those two gentlemen incentive to satisfy the prosecution and be beholden to them" (Tr. 763-764).

In response to these vigorous attacks on the credibility of the witnesses and the integrity of the prosecution, the prosecutor argued that the jury could find that the witnesses no longer had any motive to lie because in every instance but one they had already served their sentences, and their only future criminal liability could be for perjury. The prosecutor noted:

> "For the witness who testified, the jig was up a long time ago. They were caught, they were prosecuted; some of them went to trial and were prosecuted and were found guilty and then they pled guilty to other cases, some of them pled guilty to all the indictments against them and didn't go to trial. At this point in time, they have no motive whatsoever to lie. It makes no difference to them at all. Indeed, their motive is the opposite; *if they are caught lying they will be indicted for perjury.* You even heard Mr. Hellerman say because of the crimes that he committed, if he is caught committing any crime, a swindle, a con game or one single lie, the government can go back and prosecute him for everything he has

> ever done. That is his understanding with the government. So Mr. Hellerman has no motive to lie. That is the worst thing he could possibly do at this stage of the game" (Tr. 781) (language complained of is emphasized).

And in the same vein, with respect to a specific defense argument that Alpert had falsely placed Gugliaro at an incident merely to please the prosecutor (Tr. 758), the prosecutor noted that Alpert had already served his sentence and thus had no ostensible motive to lie in order to obtain favors from the Government, and that he would be in trouble if he perjured himself:

> ". . . he [Alpert] testified that Mr. Gugliaro and everybody else was at the restaurant when the phone call was made. He didn't add that at the end, because there was an objection because he didn't know whether he said Mr. Gugliaro was there and then he said to the Court in response to the question, 'Yes, Mr. Gugliaro was there.'
>
> He didn't stick it in to please me or to please the government. He's finished with the government. He served his 45 days. He's finished. Now all he has to do is to testify. *If he perjures himself, he's in trouble, that's it*" (Tr. 791) (language complained of is emphasized).

While it may have been too broad for the prosecutor to imply that the witnesses would *in fact* be indicted if they committed perjury, the thrust of the prosecutor's argument was fair: that people who are caught committing crimes and make a clean breast of things have a motive to testify truthfully lest they incur the additional penalties of perjury, which can be meted out to government witnesses. Indeed Hellerman had testified that under his agreement with the government he could and would be indicted for perjury if he gave false testimony (Tr. 412, 414, 555-557, 581).

Viewed in the context of the defense, which launched a "frontal attack on the credibility of the accomplice witnesses", *United States* v. *Bivona*, 487 F.2d 443, 445 (2d Cir. 1973), the remarks of the prosecutor fell within the range of permissible response. *See, e.g., United States* v. *Bivona, supra*, 487 F.2d at 449; *United States* v. *Santana*, 485 F.2d 365, 370-371 (2d Cir. 1973); *United States* v. *LaSorsa, supra*, 480 F.2d at 526; *United States* v. *Benter*, 457 F.2d 1174, 1176-1177 (2d Cir. 1972); *United States* v. *Brawer*, 482 F.2d 117, 133-134 (2d Cir. 1973). *Cf. United States* v. *De Angelis*, 490 F.2d 1004, 1011 (2d Cir. 1974) (concurring opinion). Moreover, taken in context, the prosecutor's comments were not a statement of her or the Government's personal belief in the truthfulness of the Government's witnesses. *Contrast, e.g., Donnelly* v. *DeChristoforo*, 42 U.S. L.W. 4682, 4683 n. 6 (U.S., May 13, 1974) (where the prosecutor said, "I honestly and sincerely believe there is no doubt in this case, none whatsoever."); *United States* v. *Bivona, supra*, 487 F.2d at 445-446 ("they testified truthfully" repeated by the prosecutor several times); *United States* v. *Briggs, supra*, 457 F.2d at 912 (where the prosecutor said "I believe these agents. I have no doubts in my mind"); *Lawn* v. *United States*, 355 U.S. 339, 359-60 n. 15 (1958) ("We vouch for [the Government witnesses] because we think they are telling the truth,").* See also *Hall* v. *United States*, 419 F.2d 582, 585 (5th Cir. 1959). Nor can it fairly be argued that the Assistant United States Attorney intended to convey to the jury as an unsworn witness her knowledge of the truthfulness of Hellerman, Alpert and Weiss. Indeed, to the contrary, the prosecutor specifically disavowed any personal knowledge of the truthfulness of the testimony of the Government witnesses and said:

---

* In none of these cases was reversal thought necessary; in *Lawn* the Supreme Court found nothing improper in the remark quoted.

> "I was not there, neither was Mr. Newman. Anything that I say to you is based on the argument and based on the evidence and on the testimony in this case and nothing that I believe" (Tr. 808).

Cf. United States v. *Pfingst,* 477 F.2d 177, 188 (2d Cir.), *cert. denied,* 412 U.S. 941 (1973).

Similarly, as an appropriate response to defense counsel's insinuations that the witnesses had implicated Gugliaro rather than someone else solely to please the United States Attorney's Office (Tr. 756-758, 763-764), the prosecutor argued that there was no evidence in the record from which the jury could find that the defendant Gugliaro was of any special interest to the Government so that special rewards were given for testimony against him as opposed to others:

> "Again, I remind you of their motive to tell the truth and the fact that their story rings true. That's what your common sense is used for in the jury room. Did this thing happen or did these people make it up out of thin air? As Mr. Newman said, did they just stick Mr. Gugliaro in there as John Jones, out of the clear, blue sky? Why? What is their beef against Gugliaro? *What is the government's beef against Vincent Gugliaro?* Why make up a story?" (Tr. 805-806) (language complained of is emphasized).

This argument was a mild response to what was in reality an unsupported claim of contrived prosecution and simply pointed out that the claim *was* unsupported. *See, United States* v. *Santana, supra; United States* v. *La Sorsa, supra.*

The defendant also claims that the prosecutor vouched for the credibility of the Government's witnesses during the following argument:

> ". . . Is there any point at this stage of the game for them to lie about those meetings?

> And don't forget that *these people were good enough when they dealt with Mr. Gugliaro to deal with him.* It's just now that they are on the witness stand testifying against him that they are no good, they are con men, they are swindlers. Before that they weren't con men or swindlers" (Tr. 789) (language complained of is emphasized).

The prosecutor's statement was clearly not a statement of her personal belief in the credibility of the witnesses nor a statement that she had personal knowledge of the truthfulness of their testimony, and it is difficult to understand how it can be read as such. It was a statement of fact based on overwhelming evidence in the record.

2. "Hurling Epithets".

Taking a remark out of context, the defendant asserts that the prosecutor placed in issue the character of the defendant, who had not testified in his own behalf, by calling him a "crook". That is not so. Using the traditional prosecution argument that the Government takes its witnesses where it finds them, the prosecutor argued:

> "Wouldn't the government have been happy if Lucy Cicalo could say while she was waiting on Mr. Gugliaro the coffee spilled and she overheard a conversation about Imperial. Wouldn't that solve all our problems? But that's not the way the world is. The only people who can testify to these meetings are the people who are there and *the people who are there are all crooks.* The only question now is, do you believe them when they tell you what happened . . .? Is there any point at this stage of the game for them to lie about those meetings?" (Tr. 788-789) (language complained of is emphasized).

It is clear from the context that the prosecutor was only referring to the prosecution witnesses, who had already been called "con-men", "swindlers" and "self-confessed perjurers" on numerous occasions by the defense, and not to the defendant. There was neither an effort to place Gugliaro's character in issue or to hurl epithets at him. *Contrast, United States* v. *Bivona, supra; United States* v. *White,* 486 F.2d 204, (2d Cir. 1973); *United States* v. *Benter, supra.*

3. Ridiculing the Defense Position.

During the cross-examination of prosecution witnesses defense counsel essentially did not examine on the facts of the case, but did seek to impeach the "accomplice" witnesses by eliciting alleged inconsistencies from prior testimony. Although no inconsistencies were apparent, defense counsel argued that they had occurred and that they were significant (Tr. 744-748, 752-756). On the other hand, the prosecutor argued that the defense attempts to impeach the witnesses had failed, and indeed, had been "desperate attempts to bring things in out of context from prior trials . . ." (Tr. 790) and went on to explain her position (Tr. 790 ff.). In addition, she commented on the defense tactic of belittling any item of corroborative evidence by labeling it a "red herring" and of explaining away the evidence which was elicited from unimpeachable witnesses (Tr. 759, 761, 765, 770, 772-774, 775-776) as follows:

> "The very thing I am going to point out which is going to be a theme throughout this summation is the fact that these witnesses were corroborated by other evidence and by other witnesses; other evidence and other witnesses which Mr. Newman calls in lawyer's language red herrings, in other words, they are really meaningless, but you will notice that every time the government used corroborating evidence, it has to become meaningless. You have to get rid of it, you have to make believe it doesn't

> exist so that the only thing you have left are the con men and swindlers, or else you have a very nice young lady like Lucille Cicalo, whom you can't call a con man or a swindler, you can only call an honest waitress who said she saw Vincent Gugliaro at the restaurant in September of 1969 through May of 1970, when she stopped working there, two Friday nights a month. That is two times nine is eighteen times. But you have to get rid of that, either get rid of it by calling the Restaurant Chez Joey and charge Mr. Gugliaro made a mistake, or by saying that the witnesses said certain things which they didn't say, and we will get to that in a few minutes" (Tr. 782-783).

The defendant claims that these remarks ridiculed the defense, citing *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973). However, these remarks were nothing more than fair adversarial responses to and accurate characterizations of the defense arguments about "red herrings" and inconsistent testimony.

4. Appeal to Law and Order.

Relying upon *United States* v. *Miller*, 478 F.2d 1315 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973), Gugliaro alleges that during summation the prosecutor twice improperly appealed to the community sense of law and order. In *United States* v. *Miller*, the prosecutor had asked the jury to "Do me a favor by being fair to the public interest and law enforcement; that is, be fair to yourselves." 467 F.2d at 1317. The Court found such argument "ill-conceived" but not prejudicial. Indeed, it was "primarily directed to the jurors' role as representatives of the general public; it was not part of a broader scheme to inflame the jury against the defendant." *Id.*, at 1318.

In response to the defense argument that the prosecution witnesses could not be believed because they were crim-

inals, the prosecutor noted that if that proposition were accepted, no criminal could ever be convicted on the testimony of other criminals who were present and knew what he was doing and suggested that the jury focus on the question of motive to lie (Tr. 788-789). It is difficult to understand how this remark constitutes an inflammatory appeal to the community sense of law and order. Rather, it is a statement of a fact obvious to lawyers and judges, but not always comprehended by laymen, that accomplice witnesses or criminals are not necessarily liars.

In closing her summation the prosecutor recited the oath which Gugliaro had taken before testifying at the Imperial I trial (Tr. 811), (the oath had been read into evidence at Tr. 671) and suggested to the jury that if the words of the oath were meaningful they should find Gugliaro guilty of violating it. In so doing the prosecutor was simply using rhetoric to make the point that the Government had established that Gugliaro had lied, and in light of the serious meaning to the oath he had taken, she argued, that the evidence compelled conviction.

During his charge Judge Wyatt properly impressed upon the jury the seriousness of the crime of perjury (Tr. 818), and it was quite proper for the prosecutor to do the same. *Cf. United States* v. *Ramos,* 268 F.2d 878, 880 (2d Cir. 1959). The argument was neither ill-conceived nor improper.

5. Comment on Matters not in Evidence.

The defendant contends that the prosecutor commented on matters not in evidence and thereby implied to the jury that she knew something they did not, when she argued that Gugliaro must have seen the sign Potpourri on the restaurant, because it was large. Although there was no direct evidence about the size of the Potpourri sign, the prosecutor, who was exhibiting a photograph of the restaurant with

its huge "Chez Joey" sign (DX. G) quite fairly argued that the jury could find that Gugliaro could not have helped but notice that the sign had changed:

> "More important—incidentally, this picture was taken May 24, 1969, submitted with the application in June of 1969 and the date is right on here.
>
> What is interesting about the picture is look at the sign, Chez Joey, it is very big. And I suggest to you in a minute when we go and narrow the sign [sic] when the Potpourri sign went up, that Mr. Gugliaro, when he was in there, couldn't have missed it, although *I also suggest to you that he knew where the Potpourri was, he knew what he was testifying about in 1971.*
>
> Mr. Newman: Judge, I am constrained, I think we are getting close to the government putting its integrity at issue, he knew—
>
> Miss Neiman: Preceded, I suggest to you, I believe—
>
> The Court: You mean that Miss Neiman is putting her person [sic] belief—
>
> Mr. Newman: Yes.
>
> The Court: I don't think she means to. Do you, Miss Neiman?
>
> Miss Neiman: I certainly don't. I wasn't there.
>
> Mr. Newman: I am sorry to interrupt.
>
> The Court: That is all right. She is making an argument. Be sure to make that clear, Miss Neiman.
>
> Miss Neiman: Yes, your Honor.
>
> I was not there, neither was Mr. Newman. Anything that I say to you is based on the argument and based on the evidence and the testimony in this case and nothing that I believe.

> *When this sign went up, you can be sure that Mr. Gugliaro saw the sign Potpourri. It is rather large* (Tr. 807-808) (language complained of is emphasized).

While the prosecutor stated that the *Potpourri* sign was large, it is apparent that what she meant to suggest, and properly, was that the Chez Joey sign was so large that Gugliaro had to notice the change and that the jury could fairly infer that the Potpourri sign was similarly placed and of a similar size. *United States* v. *De Angelis, supra,* 490 F.2d at 1007-1008. Moreover, immediately before this statement, the prosecutor disavowed any personal knowledge of the facts of the case so the jury could not possibly have understood her to be testifying. *Cf. United States* v. *Pfingst, supra,* 477 F.2d 188. Judge Wyatt, of course, gave the usual instruction that the jury's recollection of the evidence controlled and that statements by counsel were not evidence (Tr. 813).

6. "Missing Witness" Argument.

The defendant suggests that during summation the prosecutor misstated the law with respect to the inferences that the jury could draw from "missing witnesses". That is simply not so, for the prosecutor stated the law the same way it was charged by the Court * and the charge was entirely proper.

The prosecutor stated:

> "Let us also talk a little bit before we get into the evidence about uncalled witnesses.

---

* Indeed defense counsel made the same argument in summation as the Government. He argued that the jury should draw inferences unfavorable to the Government from its failure to call Taylor and Kelsey as witnesses and anticipated that the Government would argue that the witnesses were equally available to him (Tr. 766).

His Honor will instruct you, I believe, that you may draw the inference, if neither side calls a witness which is available to both sides, if either side does not call that witness, you may draw an inference that that witness may testify unfavorably to either side or no inference at all.

In other words, if the government did not call Murray Taylor as a witness and Jack Kelsey as a witness, you may find that Jack Kelsey or Murray Taylor may have testified not in favor of them.

Similarly, you may find if Mr. Newman didn't call them, they would not testify very favorably to Mr. Gugliaro.

You may also forget about the whole thing and just say, "They were not here and we are not going to consider it at all."

You also know that the government does not have to call cumulative witnesses. The government does not have to put one witness on the stand one after another to say the same thing, and I suggest you can find—and Mr. Newman is the one who brought out Murray Taylor and Jack Kelsey were government witnesses at the Imperial trial—I suggest that you draw the inference against Mr. Gugliaro, his failure to call Murray Taylor, his failure to call Jack Kelsey to lead you to believe if they were called as witnesses they would not say Mr. Gugliaro was not where the other witnesses claimed he was" (Tr. 783-784).

The Court charged:

"If a potential witness could have been called by the government or by the defendant and neither side called him then you may infer that the testimony of the absent witness might have been un-

favorable either to the government or to the defendant or to both of them. But, on the other hand, it is equally within your province to draw no inference from the failure of either side to call a witness. And at the same time you should remember that there is no duty upon either side to call a witness whose testimony would be merely cumulative, that is, in addition to testimony already in evidence" (Tr. 832).

The Court properly ruled that Murray Taylor and Jack Kelsey were equally available to the defense. Taylor was in the Courthouse and ready to testify if called as a defense witness and Kelsey was ready to appear on a phone call's notice (Tr. 637-643, 690-691, 712-713). Defense counsel made a tactical decision not to call these available witnesses as defense witnesses. The Court's ruling on "availability" and jury instruction were entirely proper. *See, e.g., United States* v. *Super,* 492 F.2d 319, 323 (2d Cir. 1974; *United States* v. *Crisona,* 416 F.2d 107, 118 (2d Cir. 1969); *United States* v. *Evanchik,* 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Armone,* 363 F.2d 385 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966); *United States* v. *D'Angiolillo,* 340 F.2d 453, 455-456 (2d Cir.), *cert. denied,* 380 U.S. 955 (1965).

POINT V

The Court properly instructed the jury on the elements of perjury.

Relying on *Bronston* v. *United States,* 409 U.S. 352 (1973) the defendant claims that the trial court erred when it refused to charge the jury that a "literally true" answer which implies false matter or which misleads the examiner does not constitute perjury; and that the trial court also erred in not specifically instructing the jury that they had

to find that the questions asked were precise and sufficiently specific for the defendant to understand them. The defendant also apparently contends that Count Four must be dismissed because his answers were "literally true," the evidence was insufficient to prove falsity and the questions were not specific enough.* These arguments are all frivolous.

The questions which are the basis of Count Four were precise and unambiguous as were Gugliaro's answers to those questions.** He flatly denied ever seeing Weiss at the Potpourri or indeed ever being at that restaurant. The Government proved beyond a reasonable doubt through the testimony of several witnesses that Gugliaro's answers were false: that he had been to the Potpourri on several occasions and had seen Weiss there.***

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* Where the Government concedes that a defendant's answers are literally true, the remedy is not a jury instruction on that issue but dismissal of the indictment because *Bronston* v. *United States, supra* has held that a perjury prosecution cannot lie where answers are literally true. Thus, Gugliaro's contention that the trial court erred in failing to instruct the jury on this issue is inappropriate.

** "Q. Did you ever see him (Weiss) in the Potpourri restaurant? A. No, sir.

Q. Were you ever in that restaurant, Mr. Gugliaro? A. No."

While the questions did not furnish the address of the restaurant, Gugliaro did not request more specificity and simply answered crystal clear questions with equally crystal clear answers. Moreover, the address of the Potpourri was given in the Government's direct case by Murray Taylor and Murray Levine, whose testimony on that subject was introduced into evidence at this perjury trial (Tr. 717-718).

*** Alpert and Weiss testified that the restaurant was known as the Potpourri and the sign was installed by October 1969; the annual renewal application for a liquor license, dated January 14, 1970, bore the restaurant's name as the "Potpourri" (DX. I); Lucille Cicalo testified that the Potpourri sign was installed in either January or February 1970 and that Gugliaro had been in the restaurant after that over a half-dozen times (See *Statement of Facts, supra*).

Gugliaro's contention that his answers were true because he had never been in the Potpourri, although he had been in its predecessor, the Chez Joey, was argued to the jury, which obviously accepted the Government's evidence that Gugliaro had been in the Potpourri and that his answers were therefore false. The Government never contended, nor did it prove, that Gugliaro's answers, although "literally true," carried deliberately false implications. To the contrary, the Government contended and proved that his answers were in all respects false. Gugliaro was therefore not entitled to the instruction he asked for, and the trial judge properly limited his more than adequate charge on this point to an instruction that the jury had to find that Gugliaro's answers were false (Tr. 822-824). *United States* v. *Pollak*, 474 F.2d 828, 831 (2d Cir. 1973); *United States* v. *Kahn*, 472 F.2d 272, 284-285 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Gremillion*, *supra*, 464 F.2d at 909. *Cf. United States* v. *Ruggiero*, *supra*, 472 F.2d at 606.

Similarly any contentions that Gugliaro's answers, although false were the result of either an innocent mistake on his part (in not realizing that the restaurant's name had changed) or an honest failure to recall that the name had changed, were questions for the jury to determine. The Court's instructions to the jury on the elements of knowledge of falsity and willfulness carefully covered the points that innocent mistake and failure of recollection do not constitute knowing and willful false testimony (Tr. 825-826).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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SHIRAH NEIMAN,
JOHN D. GORDAN III,
Assistant United States Attorneys, Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

John D. Gordan III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of May, 1974 he served 2 copies of the within appeal brief by placing the same in a properly postpaid franked envelope addressed:

Gustave H. Newman, Esq.
525 Fifth Avenue
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

28 day of May, 1974

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975